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No. 93-1260

In the Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

ALFONSO LOPEZ, JR.,

Respondent.

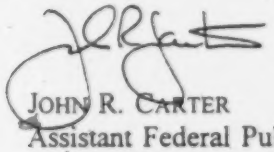
ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Respondent Alfonso Lopez, Jr., by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(6), respectfully moves this Honorable Court for leave to proceed *in forma pauperis*, and to file the attached Brief in Opposition to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Respondent was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

DATED: March 24, 1994.

Respectfully submitted.



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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a conviction under the Gun-Free School Zones Act can be sustained when the Act does not require a nexus with commerce.

No. 93-1260

In the

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT A QUESTION MERITING REVIEW BY CERTIORARI.

This case does not present the question stated by the Government, and the petition overstates both the scope and the impact of the Fifth Circuit's ruling. In its decision below, the Fifth Circuit did not hold that the Commerce Clause did not empower Congress to enact the Gun-Free School Zones Act;[1] it held that

1. Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (1990).

"Congress has not done what is necessary to locate section 922(q) [the Act] within the Commerce Clause." (Pet. 53a) In so doing, the court of appeals did not address whether Congress has the power to create *any law* making it a federal offense to possess a firearm within 1,000 feet of a school; instead, it found that Respondent's conviction under *this* Act could not be sustained.

A. The Fifth Circuit Did Not Annul an Act of Congress.

While the Government invites this Court to grant review by alluding to the inherent national importance of any decision that involves "the exercise of the grave power of annulling an Act of Congress" (Pet. 6, quoting *United States v. Gainey*, 380 U.S. 63, 65 (1965)), the Fifth Circuit Court of Appeals expressly declined to exercise its jurisdiction do so (Pet. 53a). Instead, it ruled that the indictment in this case was defective because it failed to allege a nexus to commerce.

In its zeal to posture the decision below in a manner more likely to gain review, the Government overlooks the important constitutional principle followed by the court of appeals: its duty, whenever possible, to construe a statute as constitutional. *See Dennis v. United States*, 341 U.S. 494, 501 (1950). This Court has stated that when Congress uses the term "in or affecting commerce" it intends to exercise its full power under the Commerce Clause. *Russell v. United States*, 471 U.S. 856, 859 (1985). Noting the absence of such language in the Act, the Fifth Circuit said that to keep it within that constitutional limit would require either congressional findings or prosecutorial allegations of the commerce nexus. Finding neither in this case, it reversed Lopez's conviction.

The court of appeals expressly reserved for later decision "whether section 922(q) can ever be constitutionally applied" and implied that "conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce." (Pet. 53a.) While acknowledg-

ing this tacit invitation to alter its charging practices (Pet. 4 n.1), the Government has instead chosen to seek review by certiorari. Unless and until the Government avails itself of this easily available alternative, this Court should decline review.

B. Any Conflict with the Ninth Circuit Is a Conflict of Principle and Not a Direct Conflict.

The Government also seeks review because of what it calls a conflict with the decision of the Ninth Circuit Court of Appeals in *United States v. Edwards*, 13 F.3d 291 (9th Cir. 1993). While the results reached in the two cases are diametrically opposed, the conflict between the two decisions is neither direct nor irreconcilable. The Ninth Circuit based its decision in *Edwards* on what it viewed as its governing circuit precedent set out in *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991). 13 F.3d at 293. *Evans* did not involve a challenge to the constitutionality of the Gun-Free School Zones Act, 18 U.S.C. § 922(q); it addressed the constitutionality of the ban on possession of machine guns set out in § 922(o). The Ninth Circuit upheld that ban as a reasonable exercise of Congress's power to regulate firearms under the Commerce Clause. 928 F.2d at 862. The *Edwards* court found the *Evans* holding controlling on the challenge to section 922(q). Governed as it believed it was by its own precedent,[2] the panel's stated disagreement with *Lopez*'s rationale must be viewed as only dicta.

In the decision below, the Fifth Circuit carefully considered the Ninth Circuit's decision in *Evans*, but found it to be "in reliance on Congressional findings that appear to us to be inapplicable in the present context." (Pet. 27a.) It intimated no view concerning the validity of section 922(o) and rejected no more

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2. The Ninth Circuit panel stated: "We cannot adopt the Fifth Circuit's rationale because we are bound by the law to follow the reasoning of our decision in *Evans*." 13 F.3d at 294.

than "the general statements in *Hale*[3] and *Evans* respecting the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968." (Pet. 29a n.31.) Moreover, in light of the existence of specific congressional findings regarding "highly destructive weapons," which lend support to section 922(o)'s ban on machine guns,[4] if presented with a challenge to that section the Fifth Circuit might well reach the same result as the Ninth Circuit did in *Evans*.

Thus, any conflict between this case and *Edwards*, while having real effect on the court of appeals' disposition of this case, is not direct. *Edwards* bases its holding on what its panel viewed as controlling precedent in *Evans*. The Fifth Circuit considered that same holding but found that it concerned a different statute and did not inform its consideration of the Gun-Free School Zones Act. The only direct conflict is an intercircuit difference of opinion on controlling intracircuit precedent. Such a conflict need not be resolved by this Court.

C. Respondent's Conduct Is Criminally Punishable in Every State Within the Fifth Circuit.

If, as the Government argued below, the purpose of the Gun-Free School Zones Act was to preserve a safe haven around schools, any impediment to its enforcement posed by this decision will not diminish existing state-law safeguards, nor would its continued enforcement significantly increase safety in and around schools. In the states comprising the Fifth Circuit, state law already forbids the

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3. *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992).

4. In the Omnibus Crime Control and Safe Streets Act of 1968, Congress found "the lack of adequate federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority." Pub. L. No. 90-351, § 901(a)(8), 82 Stat. 197, 226.

carrying of most firearms in and around schools.[5] Indeed, Respondent was initially charged in state court; that prosecution was dropped "due to the federal prosecution."[6] In addition, the Gun-Free School Zones Act will remain functionally superfluous so long as prosecution under it is generally limited to adults, see 18 U.S.C. § 5031 (limiting prosecution of persons under 18), while schools are generally populated by juveniles.[7]

Similarly, requiring a nexus to interstate or foreign commerce in this context will not impair federal law enforcement in this area. In the 26 years since the passage of the Gun Control Act of 1968,[8] Congress has never found it necessary to expand the Act's proscription against possession of firearms by convicted felons by abandoning a nexus with commerce, probably because most firearms do have such a nexus.

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5. In Texas and Louisiana, it is a felony to carry a firearm on school premises. TEX. PENAL CODE ANN. § 46.04(a)(1) (West Supp. 1993); LA. REV. STAT. ANN. § 14:95.2 (West Supp. 1993). Louisiana extends this proscription to a "firearm-free zone" roughly equivalent to that created by section 922(q). LA. REV. STAT. ANN. § 14:95.6 (West Supp. 1993) ("firearm-free zone"). Texas increases the penalty for many weapons offenses if they occur on the premises of a primary or secondary school. TEX. PENAL CODE ANN. § 46.13 (West Supp. 1993). In Mississippi, it is illegal for a student to carry a concealable firearm on or within 2 miles of school grounds, MISS. CODE ANN. § 97-37-17 (Supp. 1993), and illegal for anyone (including persons with concealed-weapon permits) to carry a concealed or partly concealed weapon on a school campus. MISS. CODE ANN. § 97-37-1 (Supp. 1993), § 45-9-101 (Supp. 1993) (concealed weapon permit not valid on school grounds). The Mississippi term "concealed weapon" "includes pistols, revolvers, and shortened rifles or shotguns." *Id.* § 97-37-1(1).

6. Pet. 2a n.1.

7. Petitioner has made no showing of the number of convictions potentially affected by the *Lopez* decision.

8. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

D. Congressional Action May Obviate Any Need for Review.

As Petitioner acknowledges (Pet. 6 n.4), legislation now before Congress may supply findings that link the proscribed activities to the Commerce Clause powers.[9] Such findings should significantly alter the effect of the *Lopez* decision on future prosecutions under the Act.[10] Such findings would also limit the effect of this Court's review to prosecutions under the existing, unamended Act.

II. THE CASE BELOW WAS CORRECTLY DECIDED.

As explained earlier, the Fifth Circuit did not annul an Act of Congress. It simply decided that because the indictment in this case did not allege any nexus to interstate or foreign commerce, it should have been dismissed. In so doing it carefully examined not only the Gun-Free School Zones Act, but all previous federal firearms legislation. In none of it could the court discern that Congress had made any finding that the mere possession of a firearm on or within 1,000 feet of a school zone had a significant effect on interstate or foreign commerce. Lacking any such evidence of congressional linking of the entire class of activity to commerce, it held that to the extent § 922(q) is read to authorize a conviction without allegation of a commerce nexus, it is unconstitutional. The Government chooses not to amend its charging practice accordingly.

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9. In addition to the House bill passed as amended by the Senate, H.R. 3355, see H.R. 3406, 103d Cong., 1st Sess. (introduced, 139 Cong. Rec. H8658 (daily ed. Oct. 28, 1993)), and H.R. 3763, 103d Cong., 2d Sess. (introduced, 140 Cong. Rec. H203-05 (daily ed. Feb. 2, 1994)) (both amending the Act to add as an element that the firearm had been shipped or transported in commerce).

10. Nonetheless, it bears noting that "simply because Congress may conclude that a particular activity substantially affects commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 313 (1981) (Rehnquist, J., concurring.)

The federal government is a government of limited powers. Powers not granted to it by the Constitution were reserved to the states. Included among its powers is the power to regulate commerce between the states, and this power has been construed liberally. It has been expanded to reach many areas of national life, but each extension must retain a nexus to commerce. That nexus may be found by Congress itself, or by a fact-finder chosen by Congress. Here, Congress neither made findings nor assigned that task to another fact finder. By failing to do so, it severed the connection between its Commerce Clause powers and the Act.

The Fifth Circuit also correctly took into consideration the long-recognized primacy of the states in the areas of both criminal law and education. It correctly found that principles of federalism required clear evidence that Congress intended to supplant the states' roles, and that such evidence is lacking here. Its decision to honor that primacy, absent clear congressional intent to do otherwise, remains true to the principles of federalism embodied in the Constitution.

If the Government is correct in asserting that this is an important case, its importance derives from the Fifth Circuit's recognition that the Constitution's limitations on federal power are not vestigial but real. While greatly reduced in significance as our economy has become truly national, those limitations still act to ensure that control over most aspects of day-to-day living remains in the local institutions from which our national government was created. The Commerce Clause, while supreme where properly implicated, does not confer upon Congress a general police power. Congress's invocation of those powers must always be linked in some way to commerce. No such linkage was found here, and the court of appeals properly declined to indulge in *post hoc* judicial salvaging of an

unconnected intrusion of federal power where Congress had previously indicated no intention of going.[11]

CONCLUSION

FOR THESE REASONS, the petition for writ of certiorari should be denied.

Respectfully submitted.

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11. In the Gun Control Act of 1968, Congress stated that "it is not the purpose of this title to place any undue burden or unnecessary federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. No. 90-618, § 101, 82 Stat. 1213 (1968). In the Firearms Owners' Protection Act of 1986 Congress reaffirmed this finding and further found that "the rights of citizens . . . against unconstitutional exercise of authority under the ninth and tenth amendments . . . require additional legislation to correct existing firearms statutes and enforcement policies." Pub. L. No. 99-308, § 1(b), 100 Stat. 449 (1986).